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## HAS SOCIETY BECOME TOLERANT OF FURTHER INFRINGEMENT ON FIRST AMENDMENT RIGHTS?

*Nicholas A. Primrose\**

### INTRODUCTION

In the past few years, society has become increasingly tolerant of the idea of curbing the First Amendment. This article explores the question that a free republic must continually consider: has society become tolerant of further infringement on First Amendment rights? The short answer is yes. The long answer will be discussed throughout this article based on an analysis of three important events. Admittedly, the Supreme Court of the United States and Congress dictate the legal answer to this question. However, society influences the direction of laws and ultimately sparks the debate of how much liberty and freedom will the people of America retain and demand regarding freedom of speech and religion.

The First Amendment has been, and always will be, one of the most important liberties granted to the American people. The guarantees provided in the First Amendment are largely what continue to fuel our free society: the right to practice one's chosen religion; the right to speak; the right to assemble; and to associate.<sup>1</sup> Of course, throughout history, the Supreme Court has created some exceptions to laws Congress or state governments can make which infringe on these rights. This article will not discuss the extensive history of First Amendment case law, but rather the important case law that should apply to three distinct instances where freedom of speech and religion are being challenged by society.

Part I of this article will touch briefly on the First Amendment and how it should be viewed in the context of the three important events discussed later on, specifically with regard to "religious speech." The history of the First Amendment is important in understanding why these guaranteed rights should be protected, with the exception of distinct limitations already adopted by the Supreme Court. Finally, this section will be important for reaching the conclusions and call-to-arms in Part III.

Part II of this article will discuss three important events in recent history that challenge the way society and the government view the First Amendment. This article will discuss concerns about the Ground Zero Mosque battle, the Westboro

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1. U.S. CONST. amend. I (the right to association is not listed in the First Amendment, it is implied). *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958).

Baptist funeral protests, and the Chick-fil-A gay marriage debate. Each of these events and the way society and government entities reacted to them have brought into question the future of the First Amendment. While each of these events raises different questions—those of freedom of religion, criticism of the Muslim religion, right to privacy at funerals, society's views of gay marriage and equality—the overarching theme each one of these events deals with is the level of tolerance Americans have in regard to freedom of speech and religion.

Finally, Part III of this article will discuss why there should be concern about society's shift toward limiting the First Amendment rights. Now, more than ever before, Americans need a robust and open discussion about all topics. As evidenced by the recent elections, the nation is divided on the direction of this country. Curbing speech and religion could be the most destructive path society traverses at this critical time. Finally, society should embrace differences in opinions. There are tools available to both sides of an issue to ignite debate and inspire change without infringing on the First Amendment rights of others.

## I. FIRST AMENDMENT<sup>2</sup>

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”*<sup>3</sup> The First Amendment, arguably the one amendment a majority of Americans can recite, has supplanted itself as the most important guarantee citizens of the United States have. This is not to say that Americans are uneducated about the nation's governing document, but that it is ingrained that Americans have the right to practice any religion we choose—there is no national religion. We have the freedom to say what we choose—voices shall not be silenced. However, the First Amendment guarantees were not “new” when the United States was founded; they were guarantees deeply rooted in the history of civilization.<sup>4</sup> Michael Kahn, the vice chair of the First Amendment Law Committee of the Public Interest Law Section, quoted the 17th Century philosopher Benedict de Spinoza as stating that liberty of speech was an “indefeasible natural right.”<sup>5</sup> Further, “French philosopher Montesquieu . . . believed in the distinction between speech and overt action. . . . [H]e wrote: ‘The laws do not take upon them to punish any other than overt acts . . . . Words do not constitute an overt act; they remain only an idea.’”<sup>6</sup> Fortunately enough, the Founding Fathers were learned men who

2. U.S. CONST. amend. I (It should be noted that this article focuses mostly on the free speech aspect of the First Amendment and most references will relate to that. However, there will be discussion of freedom of religion as it relates to speech.).

3. *Id.* (emphasis added).

4. Michael Kahn, *The Origination and Early Development of Free Speech in the United States—A Brief Overview*, 76 FLA. B.J. 71, 71 (Oct. 2002).

5. *Id.* (citing R. ELWES, *THE CHIEF WORKS OF BENEDICT DE SPINOZA* 258 (1951)).

6. *Id.* (citing C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 193–94 (T. Nugent trans., 1949)).

considered the writings of men like de Spinoza, Montesquieu, John Locke, and Sir William Blackstone when they created the governing documents.<sup>7</sup>

Sir William Blackstone wrote, “[e]very free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press.”<sup>8</sup> The First Amendment, as written in the Bill of Rights, was the Founders’ commitment to protect people from tyranny.<sup>9</sup> Justice Brandeis wrote perhaps one of the most compelling explanations of the First Amendment:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.<sup>10</sup>

Underlying Justice Brandeis’s opinion is the notion that the Founders understood that public discussion was paramount to protecting society from the tyranny of the majority.<sup>11</sup> The First Amendment was intended to protect an open discourse.<sup>12</sup> The other important aspect of the First Amendment was illustrated by the placement of limitations on what laws Congress could make, it gives the people a right to challenge attempts of infringement of speech by bringing cases through the judicial system and ultimately to the Supreme Court.<sup>13</sup> In discussing the issue of First Amendment jurisprudence, Mr. Kahn explains:

[T]he status of freedom of speech remained fairly quiescent in American jurisprudence for over 100 years. However, in a series of remarkable cases originating in the early 20th century, Justices Holmes and Brandeis fashioned in large part the modern theory of American freedom of speech, including some modern criticism for their liberality.<sup>14</sup>

The modern theory of freedom of speech includes a consistent theme. In *Brandenburg v. Ohio*, the modern articulation of freedom of speech guarantees explains that a state may not “forbid or proscribe advocacy of the use of force or of

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7. *Id.*

8. *Id.*

9. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

10. *Id.* at 375–76.

11. *Id.* at 375.

12. *Id.*

13. *Id.* at 374. *See also* Kahn, *supra* note 4, at 73.

14. Kahn, *supra* note 4, at 93.

law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>15</sup> Scholars seem to agree that Justices Holmes and Justice Brandeis influenced the expansive protection afforded today.<sup>16</sup> However, Mr. Kahn poses a concern based on recent events: “Hopefully, our commitment to liberty and our maturation as a society can embellish the legacy of the United States as the one country above all others in history which has continually striven for and realized the cherished ideal of freedom for its people.”<sup>17</sup> One such commitment that should be upheld is protecting speech that may invoke religious undertones.

Throughout history, both federal and state statutes that infringe upon free speech and exercise of religion have been held as constitutional.<sup>18</sup> One such important example is religious free speech. Religious speech is speech with a focus on religious values.<sup>19</sup> Arguably, this type of speech should be protected under the First Amendment for both freedom of religion and freedom of speech considerations. Religious speech is important in this article because each of the three events discussed later in Part II have distinct religious undertones, which strengthen the case for protecting the speech at the highest level of scrutiny. One example of religious speech, which the federal court has previously seen in the past two decades, includes religious speech in public schools.<sup>20</sup> Interestingly enough, in three of the six cases, the courts rejected the free speech claims.<sup>21</sup> Professor Gey explains: “The theme of all these decisions is that ‘[t]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clause protect.’”<sup>22</sup> The events discussed in Part II involve attempts to

15. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

16. *See* Kahn, *supra* note 4, at 74.

17. *Id.*

18. *See* Steven G. Gey, *When Is Religious Speech Not “Free Speech”?*, 2000 U. ILL. L. REV. 379, 382–83 (2000). *See also* Clifford G. Holderness et al., *The Logic of the First Amendment* 1–3 (Harv. Bus. Sch. NOM Unit, Working Paper No. 00-01, Mar. 3, 2000), available at <http://papers.ssrn.com/abstract=215468>.

19. *See* Gey, *supra* note 18, at 379.

20. *Id.* at 380. Professor Gey gives the following examples:

In New Jersey, a federal court, “in the spirit of protected speech,” overturned a local school board decision permitting graduating high school students to include a prayer in their graduation ceremony. In Dickson, Tennessee, public school officials refused a student permission to submit a paper on “The Life of Jesus Christ” as the subject of a research paper in a ninth-grade English class. In Denver, Colorado, public school authorities ordered a fifth-grade teacher to remove religious books from a classroom library and directed the teacher to keep his bible out of sight and refrain from silently reading it during a class reading period. In Albuquerque, New Mexico, administrators of a city-owned senior center prevented a church from showing a two-hour movie urging the adoption of the Christian faith. In Columbus, Ohio, a city parks board refused an applicant permission to erect a Latin cross to celebrate Christmas in a plaza next to the state capitol. In Roslyn, New York, a school board applied a religious discrimination regulation to prohibit a student group from restricting officers of the group to “‘professed Christians’ and those who have ‘accepted Jesus Christ as savior.’” (citations omitted).

*Id.*

21. *Id.*

22. *Id.* at 383–84 (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O’Connor, J., concurring)).

suppress private speech endorsing religion which does not offend the Establishment Clause and should be protected from government infringement by the Free Exercise and Free Speech Clauses.

There may be an even more important overarching consideration for recent concerns of the status of the First Amendment. As Dr. Clifford Holderness et al. put it, “[t]he central problem faced in defining freedom is how to deal with the dilemma that arises because one individual’s freedom is often another individual’s constraint.”<sup>23</sup> Undoubtedly, there will be speech that offends or is in disagreement with another’s opinions or beliefs, but the First Amendment protects the “marketplace of ideas” so even offensive speech must be tolerated.<sup>24</sup> This notion is applied specifically to the above discussion of religious speech. Holderness et al. explained:

One class of rights is limitless and can be granted to all individuals—limitless in the sense that granting a right to one person in no way precludes the opportunity to grant the same right to other people. . . . Examples include the right to adhere to whatever religious convictions one chooses (freedom of religion) . . . All [of] these rights can be granted to everyone without affecting the freedom of exchange or religion of anyone. In other words, the assignment of these rights need not limit the opportunity set of other individuals.<sup>25</sup>

The First Amendment protects each and every citizen’s right to speak, especially when it involves religious speech.<sup>26</sup> The next section should be viewed in light of the previous discussion on religious speech and the freedoms that are guaranteed under the First Amendment.

## II. RECENT EVENTS CHALLENGE FIRST AMENDMENT PROTECTIONS

### A. Ground Zero Mosque

“Should Muslims be allowed to build a mosque at Ground Zero,” is the first line in a *Time* magazine article when this news story hit the nation in 2010.<sup>27</sup> On May 25, 2010, the New York City community board voted 29:1 to allow the Cordoba House Project.<sup>28</sup> The Cordoba House Project, among other things,

23. Holderness et al., *supra* note 18, at 5.

24. *Id.* at 5–6.

25. *Id.* at 6.

26. See Gey, *supra* note 18, at 382–83.

27. Romesh Ratnesar, *Ground Zero: Exaggerating the Jihadist Threat*, *TIME* (Aug. 18, 2010), <http://www.time.com/time/nation/article/0,8599,2011400,00.html>.

28. *NYC Community Board Oks Ground Zero Mosque Plans*, *FOX NEWS* (May 25, 2010), <http://www.foxnews.com/us/2010/05/25/community-board-votes-support-plans-mosque-cultural-center-near-nycs-ground>.

included plans to host a worship center for Muslims.<sup>29</sup> Had the Cordoba House project been at any other location these plans would not have made the news, but since the proposed site was only two blocks away from Ground Zero in New York City, a debate erupted that took the nation by storm. Central to this debate was that “two blocks was ‘too close’ to place a mosque in relation to the site of the 9/11 terrorist attacks.”<sup>30</sup> The debate brought to question not only Americans’ opinions about Muslims, but also protecting religious freedoms and society’s commitment to the First Amendment.<sup>31</sup>

According to various polls, “between two-thirds and three-fourths of Americans agreed that Muslims had the ‘right’ to build a mosque, [but] a majority of Americans opposed the building of the [Ground Zero] mosque and thought that building it would be inappropriate.”<sup>32</sup> The general opinion about Muslim-Americans after 9/11 was anything but positive. In fact, “Americans possess[ed] lingering resentment and reservations about Arab and Muslim Americans,”<sup>33</sup> and “‘Americans tend[ed] to see both Muslims and Muslim-Americans as violent and untrustworthy’ and . . . ‘denigrated more strongly . . . than other ethnic groups . . . .’”<sup>34</sup> While certain sects of the religion have questionable motives and opinions of the United States, the Framers drafted the First Amendment to prevent the government from completely banning a religion in the United States.<sup>35</sup> Although the events of September 11, 2001, were tragic and painful, these events, including the subsequent attacks by terrorist groups, should not be a reason to limit the Muslim religion from having a place to worship in this country.

The ongoing war on terrorism since 9/11 has brought rising concern regarding infringement of civil liberties. Freedom of speech and religion are at the greatest risk because of the effect the wrong speech or religion may have on the nation as a whole.<sup>36</sup> There are distinctions between the Ground Zero Mosque and other speech coming from certain Muslims. As one scholar suggests, “[s]ome clerics now openly preach incitement, urging fellow Muslims to follow the path of the jihad . . . . Others have refused to cooperate with police investigations . . . .”<sup>37</sup> Therefore, the scholar argues that perhaps these Muslims’ liberties to freely practice religion breach the line of speech and are action instead—which could be regulated.<sup>38</sup> The

29. *Id.* (Also included in the plans were a performing arts center, swimming pool, culinary school, and childcare facilities. The project would provide 150 full-time jobs and 500 part-time jobs.).

30. Brian F. Schaffner, *Support at Any Distance? The Role of Location and Prejudice in Public Opposition to the “Ground Zero Mosque”* 1 (Am. Pol. Sci. Ass’n 2011 Annual Meeting Paper, Aug. 27, 2011), available at <http://ssrn.com/abstract=1902805>.

31. *Id.*

32. *Id.*

33. *Id.* at 3 (citing Costas Panagopoulos, *Arab and Muslim Americans and Islam in the Aftermath of 9/11*, 70 PUB. OP. Q. 608, 613 (2006)).

34. See Schaffner, *supra* note 30 (citing J.M. Sides & K.A. Gross, *Stereotypes of Muslims, Their Causes, and Their Consequence* 34 (Am. Pol. Sci. Ass’n 2011 Annual Meeting Paper, Aug. 30, 2007)).

35. Frequently Asked Questions—Religion, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/faq/frequently-asked-questions-religious-liberty> (last visited Mar. 23, 2014).

36. Kenneth Lasson, *Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty*, 27 WHITTIER L. REV. 3, 3 (Fall 2005).

37. See *id.* at 11–12.

38. See *id.* at 26.

salient point here is that anyone, religious leader or not, whose speech is advocacy or incitement of illegal activity and is intended and likely to produce such illegal activity cannot use the First Amendment as a shield.<sup>39</sup> However, to agree with this professor's analysis would jeopardize infringement on other religious groups. It would be a tragic day to tell Muslims that because a small sect of their religion has anti-American views, their places of worship are not welcomed in this country.

A lawsuit was brought by an ex-firefighter, a first responder during the attack on the World Trade Center, challenging the city's decision to allow the Cordoba House Project in total, including the mosque.<sup>40</sup> According to the American Center for Law and Justice, which brought the lawsuit, the claim alleged that the project would "[fail] to give appropriate consideration to the first responders . . . ."<sup>41</sup> On July 8, 2011, New York City Supreme Court Justice Feinman dismissed the lawsuit, opining that because the ex-firefighter's injury was not recognized yet, there was no standing that the mosque would cause harm.<sup>42</sup>

New York Supreme Court Justice Feinman's concerns should not have surrounded the ex-firefighter's lack of injury; instead his focus should have been on the First Amendment. Even though the Supreme Court held the Religious Freedom and Restoration Act of 1993 (RFRA) to be unconstitutional in *City of Boerne v. Flores*,<sup>43</sup> the City of New York was doing exactly what RFRA intended, making sure to not infringe upon the right to practice one's religion.<sup>44</sup> Factually, the two instances are complete opposites. In *Flores*, the municipality denied a permit to expand the Catholic Church.<sup>45</sup> The Catholic Church argued that the city council, in denying the permit, violated RFRA because the city was substantially interfering with the right to practice religion.<sup>46</sup> However, the Supreme Court in *Flores* found RFRA to be unconstitutional.<sup>47</sup> The municipality upheld the Ground Zero mosque permit almost in exact agreement with RFRA—trying not to infringe on the practice of religion.<sup>48</sup>

New York City's community board should not be criticized for its decision, but rather praised for its tolerance of all religions, regardless of the negative impact a sect of a particular religion had on the nation. New York City was upholding the most critical liberty we hold—freedom of speech, in this case, religious speech. By allowing the Cordoba House Project, the city delivered a message that, while not popular, was critically important. As President Obama said:

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39. See *id.*

40. Forras v. Rauf, Order Dismissing Plaintiff's Complaint, Index Order No. 111970/2010 (N.Y. Sup. Ct. Nov. 14, 2012) [hereinafter Forras v. Rauf Order]. See also Reshma Kirpalani, "Ground Zero Mosque" Clears Legal Hurdle to Build, ABC NEWS (July 13, 2011), [http://abcnews.go.com/US/ground-mosque-wins-legal-battle-build/story?id=14062701#.UJvzOeOe\\_Hl](http://abcnews.go.com/US/ground-mosque-wins-legal-battle-build/story?id=14062701#.UJvzOeOe_Hl).

41. Kirpalani, *supra* note 40.

42. See Forras v. Rauf Order, *supra* note 40, at \*8.

43. City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

44. See generally Forras v. Rauf Order, *supra* note 40.

45. Flores, 521 U.S. at 511.

46. *Id.* at 515.

47. *Id.* at 536 (It was held unconstitutional as applied to the States because Congress exceeded the enforcement power under §5 of the Fourteenth Amendment.).

48. See Forras v. Rauf Order, *supra* note 40, at \*7.



As a citizen, and as president, I believe that Muslims have the same right to practice their religion as anyone else in this country. . . . That includes the right to build a place of worship and a community center on private property in lower Manhattan in accordance with local laws and ordinances.<sup>49</sup>

The Ground Zero mosque was initiated by a private organization attempting to practice religion on private property.<sup>50</sup> Private speech endorsing a religion is protected under the First Amendment.<sup>51</sup> As will be discussed in Part III, private speech endorsing religion should not be infringed upon by public opinion or government entities.

### B. Westboro Baptist Funeral Protests

The Westboro Baptist Church has gained notoriety partially because of its protests of soldiers killed in war.<sup>52</sup> These funeral protests spread a message by using picket signs displaying the tenets and beliefs of the church.<sup>53</sup> Members of the Westboro Baptist Church believe that by spreading their message through these signs, they can call attention to their views.<sup>54</sup> Further, picketing, which is a low-cost method of advertising, has worked in generating media attention nationally.<sup>55</sup> Particularly, the Westboro Baptist Church recognizes “funerals are the perfect time to spread its message because they are events at which people consider their own mortality.”<sup>56</sup> While the Westboro Baptist Church primarily targets homosexuality, its picketing is not limited to funerals of known homosexuals. “Other notable funerals . . . include that of Coretta Scott King, Ronald Reagan, Chief Justice William Rehnquist, and Fred Rogers [of Mr. Roger’s Neighborhood].”<sup>57</sup> Most notably though, Westboro Baptist has gained consistent media attention by protesting the funerals of soldiers killed in Iraq and Afghanistan after 9/11.<sup>58</sup> According to the First Amendment Center, “between 2005 and 2006, thirty-four states saw legislation addressing funeral picketing proposed, with twenty-seven of those states ultimately passing such laws. Many of the states passed emergency legislation in reaction to the group threatening to picket funerals in their state.”<sup>59</sup>

49. See Kirpalani, *supra* note 40.

50. See *Forras v. Rauf Order*, *supra* note 40, at \*7.

51. *Frequently Asked Questions—Religion*, *supra* note 35.

52. This article does not condone or agree with the tactics of the Westboro Baptist Church in protesting during military funerals. However, it is understood that the First Amendment protects the group.

53. *Frequently Asked Questions*, GOD HATES FAGS, <http://www.godhatesfags.com/faq.html> (last visited Mar. 23, 2014).

54. *Id.*

55. Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 310 (2008).

56. *Id.* at 312 (citing *Frequently Asked Questions*, GOD HATES FAGS, <http://www.godhatesfags.com/faq.html> (last visited Mar. 23, 2014)).

57. *Id.* at 311–12.

58. *Frequently Asked Questions*, *supra* note 53.

59. See Rutledge, *supra* note 55, at 314 (citation omitted).

On March 10, 2006, U.S. Marine Lance Corporal Matthew Snyder was buried in Westminster, Maryland.<sup>60</sup> On the day of Matthew Snyder's funeral, Fred Phelps, founder of the Westboro Baptist Church, picketed the funeral roughly 1000 feet away from the church.<sup>61</sup> As a result of the Westboro Baptist Church picketing at Matthew Snyder's funeral, Mr. Snyder, Matthew's father, sued Mr. Phelps for intentional infliction of emotional distress, among other claims.<sup>62</sup> Mr. Phelps appealed the jury verdict awarding millions of dollars in damages to Mr. Snyder.<sup>63</sup> As a result of this case, the Supreme Court addressed the issue of whether Mr. Phelps had a First Amendment right to picket at this funeral.<sup>64</sup> Factually, before the Supreme Court heard and decided *Snyder*, Congress enacted the Respect for America's Fallen Heroes Act (RAFHA), which prohibited "demonstrations at cemeteries under control of the National Cemetery Administration and at Arlington National Cemetery."<sup>65</sup> "The legislative history clearly indicates that Westboro's picketing activities were the primary motivation for the legislation. As Senator Larry Craig explained, the Act 'was conceived in response to hateful, intolerant demonstrations taking place at the funeral services of deceased service members of the global war on terror.'"<sup>66</sup>

In 2011, the Supreme Court ruled on the constitutionality of Westboro Baptist's speech.<sup>67</sup> Chief Justice Roberts delivered the opinion of the Supreme Court affirming the Court of Appeals, holding that Westboro Baptist speech (picketing) was entitled to First Amendment protection.<sup>68</sup> The opinion explains the premises of the First Amendment as it applies to Westboro Baptist picketing military funerals:

The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general

60. Memorandum Opinion, *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

61. *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

62. *Id.* at 1214.

63. *Id.*

64. *Id.* at 1213–14 ("A jury found for Snyder on the intentional infliction of emotion distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages.").

65. Respect for America's Fallen Heroes Act of 2006, Pub. L. No. 109-228, 120 Stat. 387 (2006) (codified as amended at 38 U.S.C. § 2413 (2007)).

66. See Rutledge, *supra* note 55, at 315 (citing 152 CONG. REC. S5129-01 (daily ed. May 24, 2006) (statement of Sen. Craig)).

67. *Snyder*, 131 S. Ct. at 1213.

68. *Id.* at 1213–14, 1221.

interest and of value and concern to the public.” The arguably “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”<sup>69</sup>

In analyzing whether Mr. Phelps’s speech is a matter of public concern, the Supreme Court considered the content of the speech.<sup>70</sup> Since the speech related to the broad public issue of homosexuality, factually, the speech constituted a matter of public concern.<sup>71</sup> With regard to the private nature of Matthew Snyder’s funeral and the distress caused to his family, the Court had already expounded on that issue. In *Rosenbloom v. Metromedia, Inc.*, Justice Brennan opined that the *New York Times* protections relating to defamatory falsehoods about public figures should also extend to falsehoods related to private persons, if the statements were about matters of public concern.<sup>72</sup> By using his standard, Justice Brennan may agree that Mr. Phelps and the members of the Westboro Baptist Church were speaking about a private person related to a matter of public concern.

In concluding its opinion in *Snyder*, the Court explained:

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged.

Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to “special protection” under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

“[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”<sup>73</sup>

The most important theory to take from *Snyder* is that a speaker will not be punished if the speech, even though it inflicts mental, emotional, or psychological pain, is within the First Amendment.<sup>74</sup> Protecting even such painful speech reinforces the course the nation took—to create public debate and dialogue, not

69. *Id.* at 1215–16 (citations omitted).

70. *Id.* at 1216.

71. *Id.*

72. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 31–32 (1971). *See also* Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 322–23 (2010).

73. *Snyder*, 131 S. Ct. at 1218–19 (citations omitted).

74. *Id.* at 1220.

discourage it.<sup>75</sup> The constitutional protection given to speech on public matters, however emotionally hurtful, is an important premise because it protects against the tyranny of the majority from stifling speech with which the majority disagrees.<sup>76</sup>

Understanding the difficult task that faced the Court in weighing the rights of Westboro Baptist versus the grieving family of Matthew Snyder, Dr. Jeffrey Shulman wrote:

It is always bad business when rights collide. In the pantheon of rights, freedom of speech may have a preferred position, but it is no license to disregard the rights of others. Supported by the “very basic right to be free from sights, sounds, and tangible matter we do not want,” we carry with us a measure of protection from confrontational acts, when we go to and from work, when we view display advertising, when we use the city transit system, and when we seek out medical care. Where there is room, literally, for disagreement (in the meeting hall, park, street corner, or public thoroughfare), and where there is opportunity for the unwilling recipient of someone else’s communication to look the other way (in both literal and metaphorical senses), “First Amendment values inalterably prevail.”<sup>77</sup>

Dr. Shulman and the Supreme Court in *Snyder* concluded that upholding the First Amendment protections outweighed the intentional infliction of emotional distress claims, partially because speakers were not aware of what speech could lead to damages.<sup>78</sup>

Unfortunately, post-*Snyder*, Congress and President Obama took measures to create a content-neutral time, place, and manner restriction on military funeral protests.<sup>79</sup> On August 6, 2012, President Obama signed the Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012.<sup>80</sup> The Honoring America’s Veterans Act in part makes it unlawful for any person to engage in an activity from two hours before and after such funeral within 300 feet of the funeral or its path,<sup>81</sup> including any picketing, speech, display of a placard, or distribution of a pamphlet.<sup>82</sup> While the law is content-neutral, it does seem to be a direct attack on

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75. *Id.*

76. *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

77. *See* Shulman, *supra* note 72, at 340.

78. *See id.* at 344.

79. *See* Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, tit. VI, § 601, 126 Stat. 1165, 1195 (2012).

80. Nick Wing, *Honoring America’s Veterans Act Signed by Obama, Restricting Westboro Military Funeral Protests*, HUFFINGTON POST (Aug. 6, 2012, 4:48 PM), [http://www.huffingtonpost.com/2012/08/06/honoring-americas-veterans-act-obama\\_n\\_1748454.html](http://www.huffingtonpost.com/2012/08/06/honoring-americas-veterans-act-obama_n_1748454.html).

81. 18 U.S.C.A. § 1388(a)(1) (2012).

82. 38 U.S.C.A. § 2413(f) (2012).

Westboro Baptist Church. During discussions on the House floor, Representative Chris Cannon said:

In the last year, a fringe religious group known as Westboro Baptist Church has disrupted more than 100 military funerals across the country, claiming that the deaths of U.S. soldiers in Iraq and Afghanistan are God's punishment for America's tolerance of gays and lesbians. Over the past 15 years, Westboro Baptist Church has staged over 22,000 demonstrations nationwide.<sup>83</sup>

Even though these comments were made before the *Snyder* decision, this bill should not have made its way to President Obama's desk. One can understand why Congress and the President chose to press forward with the law, however, not only does this bill place limitations on Westboro Baptist's picketing, it prohibits supporters of the fallen soldier from displaying signs of support and patriotism. The Honoring America's Veterans Act places restrictions on speech of both sides because society does not like one voice.<sup>84</sup> The First Amendment protections that should be provided equally to Westboro Baptist and patriotic supporters are now gone because of Congress' and the President's disregard for these fundamental protections.

### C. Chick-fil-A CEO Comments

This event that sparked concern for future First Amendment protections took place in the summer of 2012. While the attention over Chick-fil-A has subsided since the immediate uproar, the subject matter of the controversial speech is probably going to be the most prevalent debate in society for the next few years. On July 16, 2012, the *Baptist Press* ran an interview with the Chick-fil-A restaurant chief executive officer, Dan Cathy, regarding the company's religious values.<sup>85</sup> This interview sparked controversy when Mr. Cathy responded: "Well, guilty as charged. . . . We are very much supportive of the family—the biblical definition of the family unit. We are a family-owned business, a family-led business, and we are married to our first wives."<sup>86</sup> Mr. Cathy's comments should not have come as a surprise to anyone—Chick-fil-A has operated under a Christian family since its inception and has always been closed on Sundays.<sup>87</sup> However, these comments sent shockwaves throughout social media and the mainstream news outlets. In a sense, this may be the first time a corporation, or its CEO, has publicly denied supporting a non-traditional lifestyle. Mr. Cathy's comments also fell victim to the power of social media and more importantly the grassroots

83. 152 CONG. REC. H9198-01 (daily ed. Dec. 8, 2006) (statement of Rep. Cannon).

84. See Wing, *supra* note 80.

85. K. Allan Blume, "Guilty as Charged," *Cathy Says of Chick-fil-A's Stand on Biblical & Family Values*, BAPTIST PRESS (July 16, 2012), <http://www.bpnews.net/BPnews.asp?ID=38271>.

86. *Id.*

87. *Id.*

movement of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community.<sup>88</sup> “Private citizens who disagree with Cathy organized boycotts of Chick-fil-A.”<sup>89</sup>

More shocking were the outrage and public comments made in response to Mr. Cathy from elected officials throughout the United States.<sup>90</sup> In Chicago, Alderman Joe Moreno said, “there are consequences for one’s actions, statements and beliefs . . . [b]ecause of this man’s ignorance, I will deny Chick-fil-A a permit to open a restaurant in my ward.”<sup>91</sup> In Philadelphia, the city council was considering a resolution to condemn Chick-fil-A, and city Councilman Jim Kenney sent a letter to Mr. Cathy telling him to “take a hike and take your intolerance with you.”<sup>92</sup> Humorously, Philadelphia city Councilman Jim Kenney said his resolution would “condemn this anti-American attitude of trying to deny civil liberties that every American enjoys.”<sup>93</sup> Councilman Kenney went even further, saying that Mr. Cathy would have to pay the price for having his views.<sup>94</sup> How hypocritical of Councilman Kenney, to trample all over Mr. Cathy’s right to free speech and then mask the proposal under the guise of protecting civil liberties. Boston Mayor Thomas Menino wrote an open letter to Mr. Cathy and a property manager of Chick-fil-A, Steven Binnie saying there was no place for Chick-fil-A in Boston.<sup>95</sup> One notable politician came out in support of Mr. Cathy’s freedom of speech—New York City Mayor Michael Bloomberg. Mayor Bloomberg responded to the other mayors by saying that he disagrees with the mayors and that “the fast food chain’s support of traditional marriage is none of ‘the government’s business’ . . . [and] cities should not ask about political beliefs before issuing a permit.”<sup>96</sup>

To this day, there has been no denial of building permits related to Mr. Cathy’s remarks and, as mentioned above, the outrage has dissipated. However, the idea that local government officials were threatening to withhold building permits in retaliation to Mr. Cathy’s comments offends the First Amendment. Two important points stand out before going into the legal context of why this event is troubling. First, Chick-fil-A does not have a company policy of discrimination towards the

88. See Michael C. Dorf, *Why the Chick-fil-A Controversy Raises Tough Questions About Government Power to Regulate Business Based on Owners’ Political Spending*, VERDICT JUSTIA (Aug. 1, 2012), <http://verdict.justia.com/2012/08/01/why-the-chick-fil-a-controversy-raises-tough-questions-about-government-power-to-regulate-business-based-on-owners-political-spending>.

89. *Id.*

90. *Id.* (“Recently, mayors and other politicians in Boston, Chicago, San Francisco, and elsewhere drew criticism for their comments suggesting that they would consider imposing legal obstacles to the expansion of the Chick-fil-A restaurant chain in retaliation for the anti-same-sex-marriage statements of the chain’s president, Dan Cathy.”).

91. Nathan B. Oman, *Chick-fil-A and the Problems of Soft Censorship*, DESERET NEWS (July 29, 2012), <http://www.deseretnews.com/article/765592742/Chick-fil-A-and-the-problem-of-soft-censorship.html>.

92. Todd Starnes, *Philadelphia to Consider Resolution Condemning Chick-fil-A*, FOXNEWS (July 27, 2012), <http://radio.foxnews.com/toddstarnes/top-stories/philadelphia-to-consider-resolution-condemning-chick-fil-a.html>.

93. *Id.*

94. *Id.*

95. Dan Rafter, *Read Boston Mayor’s Letter Blasting Chick-fil-A’s Discrimination*, HUMAN RIGHTS CAMPAIGN (July 25, 2012), <http://www.hrc.org/blog/entry/read-boston-mayors-letter-blasting-chick-fil-as-discrimination>.

96. See Starnes, *supra* note 92.

LGBTQ community (either employees or customers).<sup>97</sup> In fact, “it is possible for the leadership of a firm to oppose same-sex marriage and simultaneously comply with such anti-discrimination laws.”<sup>98</sup> Second, “[p]rivate customers are entitled to withhold their business from a company based on their opposition to the company’s politically contentious speech.”<sup>99</sup> The First Amendment was designed to protect a person’s speech,<sup>100</sup> and as long as Chick-fil-A does not have a policy of employment discrimination, speech such as Mr. Cathy’s is no exception. The First Amendment also protects those who disagree and allows those opposed to speak or boycott back.<sup>101</sup>

Fortunately for Chick-fil-A and Mr. Cathy, had any of the local governments followed through with the bullying statements, the law would have sided with freedom of speech.<sup>102</sup> Mr. Cathy’s comments introduced two subjects: corporate speech and government action in response to speech. The seminal case on the first issue of “corporate speech” is *First National Bank of Boston v. Bellotti*.<sup>103</sup> The First Bank of Boston wanted to spend money advertising its position on an amendment that was on the ballot.<sup>104</sup> Justice Powell delivered the majority opinion and boiled the case down to this question: does the Massachusetts statute, which prohibits corporations from giving money to campaigns supporting a ballot issue, violate the First Amendment?<sup>105</sup> The Court held that the Massachusetts statute did violate the First Amendment, and that banks are entitled to First Amendment protections.<sup>106</sup> In explaining the decision, Justice Powell wrote:

In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. If a legislature may direct business corporations to “stick to business,” it also may limit other corporations—religious, charitable, or civic—to their respective “business” when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.<sup>107</sup>

Justice Powell’s quote raises another interesting aspect of First Amendment protections: corporations may have free exercise of religious rights in how they

97. Curtis M. Wong, *Chick-Fil-A Agrees to Cease Funding to Anti-Gay Organizations*, *Chicago LGBT Group Claims*, HUFFINGTON POST (Sept. 19, 2012), [http://www.huffingtonpost.com/2012/09/19/chick-fi-l-a-anti-gay-organizations-funding-ceased\\_n\\_1896580.html](http://www.huffingtonpost.com/2012/09/19/chick-fi-l-a-anti-gay-organizations-funding-ceased_n_1896580.html).

98. See Dorf, *supra* note 88.

99. *Id.*

100. Connick v. Myers, 461 U.S. 138, 161 (1983).

101. FTC v. Sup. Ct. Trial Lawyer’s Ass’n, 493 U.S. 411, 450 (1990).

102. See Bd. of Cnty. Comm’rs v. Umbehr, 518 U.S. 668 (1996).

103. First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

104. *Id.* at 769.

105. *Id.* at 776.

106. *Id.*

107. *Id.* at 784–85 (citation omitted).

conduct business.<sup>108</sup> Similarly, Chick-fil-A, while not overtly religious in its speech, does have Christian values, which are displayed, for example, by closing business on Sundays.<sup>109</sup> Again, Mr. Cathy's speech could be considered "religious speech," which should receive the highest First Amendment protections.<sup>110</sup>

Hypothetically, what would have happened if one of the cities chose to punish Chick-fil-A for Mr. Cathy's speech or even the company's religious views as it relates to non-traditional marriage? The Supreme Court case, *Board of County Commissioners v. Umbehr*<sup>111</sup> provides some direction. In *Umbehr*, an independent trash-hauling contractor sued the county board after it terminated his contract, alleging it terminated the contract because he vocally criticized the board.<sup>112</sup> While *Umbehr* focuses on independent contractors' speech, it also explains the relationship with a government body and whether speech is protected.<sup>113</sup> We know that the status of the speaker, whether it is a private person or a government employee, is provided a certain level of First Amendment speech protection.<sup>114</sup> The government employee speech doctrine tells us that private persons and government employees do not have the same First Amendment rights if the speech pertains to a government employee's official duties.<sup>115</sup> Justice O'Connor, writing for the majority, explains, "[i]ndependent contractors appear to us to lie somewhere between the case of government employees . . . and our other unconstitutional conditions precedents,"<sup>116</sup> and that "we recognize the right of independent government contractors not to be terminated for exercising their First Amendment rights."<sup>117</sup> The reason for discussing *Umbehr* is that the Court, in essence, sets a limit that even independent contractors (pseudo-employees of government) have First Amendment protections that should not be violated—making the case that Chick-fil-A, further disconnected than an independent contractor, should have the same protections.<sup>118</sup> As Eugene Volokh put it, "denying a private business permits because of such speech by its owner is a blatant First Amendment violation. Even when it comes to government contracting—where the government is choosing how to spend government money—the government generally may not discriminate based on the contractor's speech."<sup>119</sup>

Perhaps the elected officials thought that they could, through regulations or by denying building permits, put pressure on Chick-fil-A to change its corporate

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108. *Id.* at 785.

109. *Chick-fil-A: Why We're Closed on Sundays*, CHICK-FIL-A, <http://www.chick-fil-a.com/Company/Highlights-Sunday> (last visited Mar. 3, 2014).

110. *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

111. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996).

112. *Id.* at 671.

113. *Id.* at 680.

114. *Id.* at 676.

115. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

116. *Umbehr*, 518 U.S. at 680.

117. *Id.* at 686.

118. *Id.* at 677.

119. Eugene Volokh, *No Building Permits for Opponent of Same-Sex Marriage*, THE VOLOKH CONSPIRACY (July 25, 2012), <http://www.volokh.com/2012/07/25/no-building-permits-for-opponent-of-same-sex-marriage>.



position. However, *Consolidated Edison Co. v. Public Service Commission*<sup>120</sup> addresses this issue. In *Consolidated Edison*, the New York Public Service Commission issued an order prohibiting public utility companies from putting inserts in the monthly bills that supported certain public issues.<sup>121</sup> The Supreme Court said that, “government action that regulates speech on the basis of its subject matter, ‘slips from the neutrality of time, place, and circumstance into a concern about content.’”<sup>122</sup> Relying on long standing First Amendment principles, the Court further stated that, “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.”<sup>123</sup> Similar to *Consolidated Edison*, in the Chick-fil-A scenario, government officials were stepping close to the line of trying to control the message of Chick-fil-A and Mr. Cathy. The First Amendment requires state action,<sup>124</sup> and even though there was no action to violate the First Amendment, an argument could be made that threatening to withhold building permits is state action. If a regulated monopoly like a public utility company cannot have its speech restricted, then a fast-food chain restaurant’s speech should not be either.

Departing from the specific nature of Mr. Cathy’s speech, the First Amendment should protect corporate religious speech as a whole. Corporate identity is extremely important in attracting customers and making a profit. “Consumers who appreciate the potential effects of their spending choices are more likely to patronize companies in line with their moral sentiments,”<sup>125</sup> and “[o]ne way for corporations to increase their corporate social responsibility is through the adoption of a religious identity.”<sup>126</sup> A *Business Insider* article explained that “[m]any big brands are intensely religious . . . it comes from a devout founder passing his or her values on down the line.”<sup>127</sup> Should businesses be encouraged to have a corporate religious identity? Should the businesses that do have a religious identity be encouraged to freely express their beliefs? Based on the outrage over Chick-fil-A, society’s opinion would suggest the answer to both of those questions seems to be a resounding no, even though the Constitution and case law say otherwise.<sup>128</sup>

120. *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530 (1980).

121. *Id.* at 532–33.

122. *Id.* at 536.

123. *Id.* at 537–38.

124. *Id.* at 534.

125. Julie Marie Baworowsky, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1713 (2008).

126. *Id.* at 1714.

127. Kim Bhasin & Melanie Hicken, *17 Big Companies That Are Intensely Religious*, BUSINESS INSIDER (Jan. 19, 2012), <http://www.businessinsider.com/17-big-companies-that-are-intensely-religious-2012-1?op=1> (The companies in the article include: Forever 21, Tyson Foods, Chick-fil-A, Mary Kay, In-N-Out Burger, Timberland, Alaska Air, Marriott Hotels, JetBlue, Interstate Batteries, Trijicon, Hobby Lobby, ServiceMaster (parent-company of Merry Maids, Terminix, and American Home Shield), George Foreman Cooking, H.E.B. grocery store chain, Curves gym, and Tom’s of Maine.).

128. *See* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777–80 (1978).

Corporations have the constitutional right to freedom from state interference with their religious expression. Fourteenth Amendment jurisprudence acknowledges that corporations are persons holding rights under the Due Process and Equal Protection Clauses. These rights derive from the longstanding acknowledgement that the corporation is an independent, communal entity created by individuals. Because corporate persons merit the same protection as individual persons, the Fourteenth Amendment requires that corporations receive the same liberties of expression that individuals enjoy, including protection for their religious expression.<sup>129</sup>

While some individuals disagree with the idea of corporate personhood, this is the legal precedent since 1886 when Justice Field wrote in *Santa Clara County v. Southern Pacific Railroad*<sup>130</sup> that the corporation was a person entitled to equal protection of the laws.<sup>131</sup> As the final section of this article will suggest, the goal of the First Amendment is to maintain a society where speech is welcomed and not discouraged, whether it is an individual or a corporation speaking.

### III. THE FUTURE OF THE FIRST AMENDMENT

#### A. Protect the “Marketplace of Ideas”

Based on current events and the subsequent reaction, it appears that the First Amendment, in particular religious speech, is under attack. If society does not protect these rights, society could see restrictions on speech that are not in concert with the Framers’ intentions and vision of a society that encourages all speech. Above were just three examples of religious speech in the past five years that have raised concerns about where society is heading. Whether one theorizes that the Constitution should be interpreted with original intent or that it is a living document, one must not take the recent trend lightly. These examples encompass a group’s desire to practice religion and have a voice in New York City, a group protesting based on its religious views, and a CEO who was under pressure because of his company’s attachment to religion. This section will discuss further reasons for a general protection of speech and a call-to-arms for society to be cognizant of the danger of restricting speech.

The First Amendment, as argued above, is the most important liberty interest protected by the Constitution. From the early 20th Century, jurists and scholars

129. See Baworowsky, *supra* note 125, at 1748.

130. *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394, 417 (1886).

131. See *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting) (“[I]n 1886, this Court in the case of *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, decided for the first time that the word ‘person’ in the amendment did in some instances include corporations.”); *Covington & L. Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896) (“It is now settled that corporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.”).

have recognized the “marketplace of ideas”<sup>132</sup> as one of the First Amendment values. Julie Baworowsky explains the importance of the theory of the “marketplace of ideas”:

[T]he “marketplace of ideas” theory insists that all speech be legally equal speech and none legally worthless speech. America has a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” . . . No viewpoint should get disfavored government treatment. . . . Encouraging the increase of society’s raw quantity of information irrespective of society’s opinion about particular speech may also justify protection of all speech.<sup>133</sup>

Even in a perfect world there will be disagreements about public issues. But, the First Amendment insures disagreements and open discussion about those differences.

One can certainly understand how allowing a mosque blocks away from the 9/11 site can cause concern, controversy, and negative opinions regarding Muslims. But, the “marketplace of ideas,” the freedom of religion, and a national commitment to welcoming all religions overrides any of the detractors. Sympathy is deserved to those affected by 9/11, and those affected are encouraged to speak out publicly about the importance of protecting the memories of those who lost their lives. However, restricting others’ religious speech because of 9/11 would do a disservice to the “marketplace of ideas” and would open the door to breed hatred and a close-minded society.

The other two events discussed above relate to the issue of same-sex marriage. Both Westboro Baptist and Mr. Cathy’s comments strike a chord because the messages were supporting the traditional marriage between a man and a woman and the disapproval of same-sex marriage. While it would be hypocritical to suggest that the LGBTQ community and its supporters should be less critical of these messages, it is concerning how quick proponents of same-sex marriage are to

132. The “marketplace of ideas” was originally developed in the book, *On Liberty* by John Stuart Mill. See JOHN STUART MILL, ON LIBERTY 38–39 (J.W. Parker and Son, 1859) (“There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it.”). In the United States, Justice Oliver Wendell Holmes was the first to discuss the idea in his dissenting opinion in *Abrams v. U.S.*, 250 U.S. 616, 630 (1919). Justice Holmes wrote:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wish safely can be carried out.

*Abrams*, 250 U.S. at 630. Finally, the phrase “marketplace of ideas” appears for the first time in Justice Brennan’s concurring opinion in *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 308 (1965), when he wrote, “[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”

133. See Baworowsky, *supra* note 125, at 1763–65.

attack the First Amendment rights of those not agreeing with their views. The LGBTQ community's speech has every First Amendment protection guaranteed by the Constitution.<sup>134</sup> Take for example those protesting Mr. Cathy's statements—calling for restrictions on the expansion of Chick-fil-A restaurants, attacking those who support the restaurant, and holding protests discouraging Mr. Cathy from having a voice. The concern is that Mr. Cathy and Chick-fil-A should not have to suppress their religious views and speech, which may occur without a renewed movement for First Amendment protections.

"[T]he purpose behind the Bill of Rights and of the First Amendment is particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."<sup>135</sup> The opinion of same-sex marriage is reported to be at a fifty-fifty split in the nation right now,<sup>136</sup> so arguably the intolerant society could be supporters or opponents of same-sex marriage. The point is that the First Amendment protects both voices: Mr. Cathy and the LGBTQ community on this topic. And regardless of one's personal position on the issue, society should be welcoming of each position. The LGBTQ community is extremely effective at spreading the message of equality, and this community has helped to create a more open, welcoming society. But, sending the message to restrict someone's viewpoint because it disagrees with the LGBTQ community's message is a dangerous path to take. The tyranny of the majority is exactly what the First Amendment is meant to prevent.<sup>137</sup> An attack on one group's freedom of speech is an attack on the freedom of speech of every single American. Those advocating for equality of marital rights for everyone must recognize that the First Amendment applies to everyone.

## B. Social Media & the First Amendment

For better or worse, social media provides the ability to send messages instantly to billions of listeners. The "marketplace of ideas" has expanded from whomever was within earshot of one's speech to the entire world.<sup>138</sup> With that being said, imagine how boring these social media sites would be if they were one-sided and were not open to public discussion. Political comments and opinions are shared on Facebook or Twitter. Instantaneously, the First Amendment is at work allowing those who agree and disagree with expressed views to express their

134. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

135. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

136. Andrew Kohut, *Yes, More Americans Favor Legalizing Gay Marriage, but Just How Many Do?*, PEW RESEARCH CENTER (Mar. 29, 2013), <http://www.pewresearch.org/2013/03/29/yes-more-americans-favor-legalizing-gay-marriage-but-just-how-many-do/> ("[T]he percentages saying they favor legalizing same-sex marriage ranges from 49% in surveys by the Pew Research Center and Fox News, to 58% in a Washington Post/ABC News poll.").

137. See *McIntyre*, 514 U.S. at 357 (explaining that the First Amendment's purpose was to protect the speaker of unpopular views from the "tyranny of the majority.").

138. See *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (finding that the internet is an expanding marketplace of ideas whose growth has been phenomenal and that such speech should not be regulated by the government, for fear of discouraging freedom of expression in this democratic society).

position. To retreat on the open nature of public discourse in America would be a tragic step. There is some concern though that social media is becoming less open.

In *Bland v. Roberts*,<sup>139</sup> social media played a role in the firing of employees. In *Bland*, the plaintiffs (employees in the sheriff's office) publicly supported the current Sheriff's opponent who was running for the sheriff's position.<sup>140</sup> One of the plaintiffs posted statuses on Facebook and "liked" the opponent's Facebook page.<sup>141</sup> After the Sheriff won his re-election, six of the plaintiffs were fired.<sup>142</sup> They claimed their termination was a violation of the First Amendment protections (that a "like" on Facebook was protected speech).<sup>143</sup> The District Court for the Eastern District of Virginia held that the action on Facebook was not protected speech and there was no violation of First Amendment rights; therefore, the Sheriff was entitled to fire the employees.<sup>144</sup> On appeal to the Fourth Circuit, the Court discussed in great detail how to apply the First Amendment protections to social media and the Internet.<sup>145</sup> The Court compared a Facebook "like" of a political campaign page to placing a political sign in one's front yard.<sup>146</sup> In conclusion, the Fourth Circuit held that the Plaintiff's Facebook "like" constituted pure, symbolic expression and that the First Amendment protected the Plaintiffs from being terminated.<sup>147</sup> Since most communication today is done through a social media site, the original termination and initial decision in *Bland* was disconcerting. "[T]he digital age makes increasingly clear that the point of the free speech principle is to promote not merely democracy, but something larger: a democratic culture."<sup>148</sup> Even though the Fourth Circuit helped clarify that "liking" political pages on Facebook is protected under the First Amendment, it does beg the question of how other online political and religious actions, "likes," posts, and opinions will be protected now that society is ingrained with social media.

Yale Law Professor Jack Balkin explains the importance of speech and social media:

When large numbers of people use these technologies to speak, they will set their own agendas and express their own concerns, which may be personal and cultural, or may transcend the nation state. In this way the digital technologies of the twenty-first century make salient aspects of speech that were always present to some degree. Digital speech, like speech generally, ranges over the whole culture; only some of it is connected to politics, the central concern of democratic deliberation theories. Digital speech, like

139. 857 F. Supp. 2d 599 (E.D. Va, 2012).

140. *Id.* at 601.

141. *Id.*

142. *Id.*

143. *Id.* at 602, 603.

144. *Id.* at 603.

145. See *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013) (amended Sept. 23, 2013).

146. *Id.* at 386.

147. *Id.*

148. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 438 (2009).

speech generally, is interactive; people talk back to each other constantly. They participate in virtual communities, and they use these communities to build things together. Finally, digital speech, like speech generally, is opportunistic and appropriative.<sup>149</sup>

Ultimately, Professor Balkin concluded protecting free speech in the digital age will be less of a constitutional problem and more about technological administration.<sup>150</sup> However, First Amendment protections need to be at the forefront. Social media is the next frontier of First Amendment protections. One's right to "like" something on Facebook, tweet about something on Twitter, or post a photo on Instagram should be the future focus of the First Amendment. Social media is the ideal "marketplace" for the 21st century; it creates a dynamic place for every conceivable opinion to be expressed and shared. If anything is to be learned from the current events discussed above, it is that social media made these events national news and allowed everyone to have a voice. The First Amendment protects the voices of the Ground Zero mosque proponents, of the Westboro Baptist protesters, and of the Chick-fil-A CEO, Dan Cathy.

#### IV. CONCLUSION

Throughout the research and discussion of this article with others, the theory of this paper has not changed. From the start, the issue was that society was becoming less and less concerned about First Amendment protections. Facebook friends have been "lost" based on positions and opinions held on the current events discussed above. Numerous debates have occurred about the current events discussed above and about protecting the First Amendment above all else. Society needs time to reflect on its position on the First Amendment. During the course of this past presidential election, America saw the benefits of a free society where speech is encouraged. But it also saw that people were discouraged from speech for fear of retaliation or persecution for their views. If one posted that he liked Mitt Romney for president, the speaker was seen as inconsiderate to same-sex couples, racist, and hating poor people. If one posted that he liked President Obama, the speaker was seen as a socialist, supporting terrorists, and disregarding religious values. This is exactly the situation everyone should be fearful of—a society that denigrates and demeans those who exercise their First Amendment right to speak. Fearful of the day a business must be absent from religious values. Fearful of a day where mosques are prohibited in the most heavily populated city. Fearful of a day where one cannot protest or support a military funeral.

For society to take the First Amendment guarantees seriously, society needs to fight every day for those rights. Society should encourage neighbors to have different political views. Society should encourage businesses to be Christian, Muslim, Jewish, etc. If society loses sight of the "marketplace of ideas" and loses

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149. *Id.* at 440.

150. *Id.* at 443–44.

sight of one of the core principles this country was founded on, that will be the demise of this free society.